

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK DWAYNE MCCADNEY,

Defendant-Appellant.

UNPUBLISHED

August 12, 2003

No. 237198

Macomb Circuit Court

LC No. 01-000105-FC

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(5), and fleeing and eluding a police officer, MCL 257.602a(3)(a). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to nine to thirty years' imprisonment for armed robbery, five to fifteen years' imprisonment for possession of less than twenty-five grams of cocaine, and five to fifteen years' for fleeing and eluding a police officer, these sentences to be served consecutive to defendant's existing department of corrections sentence. He appeals as of right. We affirm in part, reverse in part, and remand.

Defendant's convictions arise from allegations that, in the early morning hours of November 14, 2000, he and codefendant Vincent Terrell Owens robbed a Roseville gas station, located near I-94 and Ten Mile. The complainant gas station attendant testified that, on November 13, at approximately 6:00 p.m., codefendant Owens came into the store, bought some instant lottery tickets, and asked when the lottery machines would be closed. The complainant responded that they would be closed at midnight.

At approximately 1:00 a.m., codefendant Owens returned to the station, and asked to cash a lottery ticket. When informed that the machines were closed, codefendant Owens requested an instant lottery ticket. The complainant testified that, when he turned around after retrieving a ticket, codefendant Owens was pointing a gun at him. Codefendant Owens said to the complainant, "this is a stickup mother f**ker." Codefendant Owens allegedly held the gun in his right hand, and covered it with his left. The complainant saw only the barrel of the gun but had no doubt in his mind that codefendant Owens had a gun. The complainant instantly raised his hands.

Codefendant Owens directed the complainant to put his hands down, treat him like a regular customer, and “just open the cash register.” The complainant complied, and gave codefendant Owens approximately \$225. Codefendant Owens then directed the complainant to give him several instant lottery tickets. Codefendant Owens thereafter broke the phone, and told the complainant to go into the back room “if [he didn’t] want to die” The complainant came out of the back after he heard a bell indicating that codefendant Owens had left the store. The complainant saw a police car and motioned it to follow the defendants’ car.

Roseville Police Officers Steven Boucher and Thomas Pfeifer testified that, when they entered the gas station’s parking lot, they observed defendant, who was driving a silver or gray older model Oldsmobile, continuously look at the police car. Defendant then started to slowly pull away from a pump. Shortly thereafter, codefendant Owens came out of the gas station holding instant lottery tickets and other unidentifiable things. He walked by the police car, and then ran to the Oldsmobile, which was still moving toward the exit. After codefendant Owens got into the car, it quickly accelerated out of the lot. When the officers pulled toward the front of the gas station, they observed the complainant banging on the window and pointing in the direction of the Oldsmobile. The officers pulled behind the vehicle, activated their emergency lights and siren, and shined a spotlight directly on the car. Defendants did not stop, but fled from the police at a high-rate of speed. During the ensuing police pursuit, codefendant Owens threw objects out of the car window.

Eventually, the car stopped in a police station parking lot, and defendants exited and ran in different directions. Officer Boucher chased and eventually assisted in capturing defendant. Officer Pfeifer chased and captured codefendant Owens. No weapon was recovered from either defendant, or from the area traveled during the pursuit. However, officers recovered several lottery tickets from inside codefendant Owens’ jacket, and \$160 from the front pocket of his pants. Defendant had three twenty-dollar bills on his person, and a small bag of cocaine. Codefendant Owens indicated that, during the police chase, he gave defendant three twenty-dollar bills.

At the Roseville Police Station, codefendant Owens admitted that he planned and robbed the gas station, but denied being armed with a weapon. He claimed that, when he walked into the gas station, he had his finger sticking out of his sleeve. During trial, codefendant Owens again admitted that he committed an unarmed robbery but, contrary to his statement, denied ever sticking out his finger at the complainant. Codefendant Owens maintained that he never had a gun, never simulated anything to look like a gun, and never threw a gun out of the car window during the police chase.

I

Defendant first argues that the prosecution adduced insufficient evidence at trial for a rational jury to have found all the essential elements of armed robbery proven beyond a reasonable doubt. Specifically, defendant argues that the prosecution did not prove either that defendant intended the commission of the crime of armed robbery, or had knowledge that Owens intended the crime of armed robbery. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and

determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001). The prosecution relied in part on an aiding and abetting theory. A defendant who aids or abets a principal in committing a crime may be convicted as if the defendant had committed the crime himself. MCL 767.39. To establish that a defendant is guilty of aiding and abetting, the prosecution must show that the crime charged was in fact committed, that the defendant performed acts or gave encouragement that assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant claims the prosecution provided insufficient evidence to prove defendant's intent or knowledge. Questions of intent must be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). A trier of fact may infer a defendant's intent from the facts and circumstances of the case. *Carines, supra*, 460 Mich 757-758. Because establishing the state of mind of an actor is very difficult, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Defendant does not contest that the prosecution produced sufficient evidence that the crime of armed robbery was committed, or that defendant's actions assisted the commission of the crime. Regarding defendant's intent or knowledge that an armed robbery would occur, the prosecution introduced evidence that defendant began to pull away from the gas station as soon as the police arrived, without waiting for his passenger to join him, and that defendant had positioned his vehicle so as to allow for a quick departure. A reasonable jury could have inferred that defendant positioned his vehicle to allow a quick getaway and that defendant began to pull away as soon as he saw the police because he knew codefendant Owens was committing a robbery, and the two should leave the scene immediately. Evaluating this circumstantial evidence in the light most favorable to the prosecution a reasonable jury could have found that defendant intended that codefendant Owens rob the gas station, or had knowledge that codefendant Owens was going to rob the gas station. Because the prosecution provided enough evidence for the jury to reasonably conclude that defendant aided or abetted the commission of an armed robbery defendant's conviction must stand. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

In the same vein, defendant also argues that the trial court should have granted his motion for a directed verdict on the charge of armed robbery because there was insufficient evidence to prove defendant's intention or knowledge that codefendant Owens would rob the gas station, therefore there was insufficient evidence to justify a reasonable conclusion of guilt beyond a reasonable doubt. Again, we disagree. After reviewing the record de novo, and viewing the

evidence in the light most favorable to the prosecution, we find that the trial court rightly denied defendant's motion for a directed verdict because the prosecution presented sufficient evidence at trial for a rational jury to reasonably conclude that defendant aided or abetted the commission of an armed robbery. *People v Mayhew*, 236 Mich App 112, 126; 600 NW2d 370 (1999).

II

Defendant's next issue on appeal is that the trial court should not have instructed the jury that it could not find Owens guilty of armed robbery but defendant guilty of unarmed robbery, and thus the trial court committed error requiring reversal. We agree.

During deliberations at defendant's trial, the jury sent a note to the judge. The note inquired whether the jury could find defendant guilty of unarmed robbery, while finding codefendant Owens guilty of armed robbery. Defendant's court appointed counsel was absent. Defendant did not formally object to the judge's supplemental instructions to the jury, however defendant, in defense counsel's absence, did make informal statements of protest,¹ which we construe as sufficient to preserve this issue for our review. However, the judge, after conferring with the prosecutor, and codefendant Owens' counsel, answered the jury's question in the negative. The jury returned a verdict of guilty of armed robbery for both defendant and codefendant Owens.

When reviewing preserved claims of instructional error, this Court reviews the instructions in their entirety to determine if error requiring reversal occurred. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Instructions may not be extracted piecemeal to establish error. However, jury instructions must not exclude material issues, defenses or theories. *Id.* As the prosecution concedes on appeal, the trial court's answer to the jury's question was incorrect. The trial court's answer stated that the jury could not find codefendant Owens guilty of armed robbery, and defendant guilty of unarmed robbery. But clearly, a jury may convict an aider and abettor of an offense lower in degree than the offense of which the principal was convicted. *People v Folkes*, 71 Mich App 95, 97-98; 246 NW2d 403 (1976). The guilt of an aider and abetter depends on his own actions, intent and state of mind. *Id.*

In the instant case, the trial court's supplemental instruction excluded the theory that defendant was guilty of aiding and abetting unarmed robbery, while codefendant Owens was guilty of armed robbery. Because the trial court's errant instruction to the jury prevented the jury from considering a material theory of the case, we find that reversible error occurred and defendant is entitled to a new trial on the charge of armed robbery. *Folkes, supra*, 71 Mich App 97-98.

III

¹ Defendant first stated, "I supposed [sic] to be tried differently on every aspect of every view, right? If it's different, it's different." Defendant continued somewhat less coherently, "now we at a stepping stone now where the only thing I can remember was stated on when you was instructing the jury was they supposed to identify Mr. Owens and me as two different individuals . . . I mean, I had really basically for me to be the accessory of the case . . ."

Defendant also argues that the prosecutor's conduct at trial deprived him of a fair trial. We disagree.

A defendant must object to preserve a claim of prosecutorial misconduct for appellate review. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Because defendant did not object to the prosecutor's conduct at trial this issue is unpreserved. *Id.* We review unpreserved claims of prosecutorial misconduct for plain error; to find plain error, this Court must find that error occurred, and that such error was clear or obvious, and affected a defendant's substantial rights. *Id.* Plain error warrants reversal only when it has resulted in the conviction of an innocent defendant, or when it has seriously affected the fairness, integrity, or public reputation of a judicial proceeding. *Id.* This Court reviews claims of prosecutorial misconduct on a case by case basis, and must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial misconduct is a constitutional claim, which this Court reviews de novo. *People v Pfaffle*, 246 Mich App 282, 288; 631 NW2d 162 (2001).

Defendant first claims that he was denied a fair trial by the prosecutor's misstatements of the law to the jury. During voir dire, and during the prosecutor's opening statements and closing arguments, the prosecutor proffered that one who assists in the commission of a crime is as guilty as one who actually commits the crime, without addressing the issue of intent. A prosecutor's clear misstatement of the law can deprive a defendant of a fair trial, if uncorrected. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, in this case, the prosecutor's statements were corrected by the judge's instructions to the jury. The judge instructed the jury that in order to find defendant guilty of armed or unarmed robbery under an aiding and abetting theory, the jury must find that defendant intended to assist codefendant Owens in the commission of a crime. This Court will not find plain error if a curative instruction could have cured the prejudicial effect of a prosecutor's statements. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Because the judge corrected the prosecutor's misstatements of the law, the prosecutor's statements do not amount to plain error. *Id.*

Defendant next claims that the prosecutor argued facts not in evidence. A prosecutor may not make a statement of fact to a jury unless it is supported by the evidence presented. *Schutte, supra*, 240 Mich App 721. The prosecutor surmised during his closing arguments that codefendant Owens and defendant may have committed the robbery in order to obtain money for drugs. Defendant characterizes this conclusion as an improper statement of fact. This comment followed codefendant Owens' testimony that Owens and defendant had been at a "drug house" prior to the robbery. In this case, the prosecutor did not introduce facts, but rather argued for the jury to infer from defendant's presence at a drug house that codefendant Owens and defendant had committed the robbery to obtain more money for drugs. A prosecutor may argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, and thus there was no error here. *Id.*

Defendant also argues that the prosecutor improperly denigrated defense counsel. A prosecutor may not attack the personal credibility of defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Nor may the prosecutor suggest that defense counsel is intentionally attempting to mislead the jury. *People v McCray*, 245 Mich App 631, 636-637; 630 NW2d 633 (2001). In his closing arguments, the prosecutor suggested that defendant and codefendant Owens were hoping the jury would not use its common sense.

Defendant characterizes this as a statement that the defense was trying to mislead the jury. The prosecutor also discounted some of defense counsel's arguments. Defendant characterized these statements as denigration of defendant's counsel. However, in the first instance the prosecutor's comments were aimed at defendant and codefendant Owens, and not their counsel. A prosecutor may argue that a defendant should not be believed. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In the second instance, the prosecutor merely rebutted one of defense counsel's arguments. Such a rebuttal is not misconduct. *Kennebrew, supra*, 220 Mich App 608. Because the prosecutor did not denigrate the credibility of defense counsel, or suggest the defense counsel was intentionally trying to mislead the jury, the prosecutor's comments were proper.

Next, defendant alleges that the prosecutor made an improper "civic duty" argument to the jury. A prosecutor may not suggest that the jury convict a defendant as part of its civic duty, because such a suggestion introduces issues that are broader than the defendant's guilt or innocence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). In the prosecutor's closing arguments, the prosecutor suggested that the jury send defendant "a message" by convicting him. Defendant contends that this suggestion amounts to a civic duty argument. However, in this case, the prosecutor did not exhort the jury to return a verdict of guilty because of issues outside defendant's guilt. Rather, the prosecutor suggested the jury convict defendant because of his guilt. A prosecutor may ask the jury to convict on the basis of the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Because the prosecutor did not make a civic duty argument, his comments did not constitute misconduct.

Defendant claims that the prosecutor improperly appealed to the jury's sympathies. First the prosecutor suggested to the jury that defendant did not deserve a break because the complainant gas station attendant had not gotten a break. Secondly, the prosecutor referred specifically to jurors with family members who had been the victim of a crime. The prosecutor urged these jurors to receive the complainant's testimony as they would receive the testimony of a member of their own family in similar circumstances. A prosecutor may not appeal to a jury to sympathize with a victim. *Watson, supra*, 245 Mich App 591. However, the prosecutor's lone suggestion that defendant did not deserve a break does not amount to misconduct. A prosecutor's comments do not amount to misconduct if they are isolated, do not blatantly appeal to the jury's sympathies, and are not so inflammatory as to prejudice defendant. *Id.*

Furthermore, because defendant failed to object at trial, the prosecutor's comparison of the complainant with family members of certain jurors is reversible only if it amounts to plain error. This Court will not find plain error if a curative instruction could have cured the prejudicial effect of a prosecutor's statements. *Watson*, 245 Mich App 591-592. The trial judge instructed the jury that it was not to allow sympathy to influence its decision. Because the judge corrected the prosecutor's appeals to the jurors' sympathies, the prosecutor's statements do not amount to plain error. *Id.*

Finally, The trial judge's instructions cured any misstatements of the law, or appeals to the sympathies of the jury by the prosecutor. The prosecutor did not introduce any facts not in evidence during his closing arguments. The prosecutor did not denigrate defense counsel. Nor did the prosecutor make improper "civic duty" arguments to the jury. In sum, no alleged misconduct on the part of the prosecutor amounted to plain error depriving defendant of his substantial rights. *Schutte, supra*, 240 Mich App 720.

IV

Next on appeal, defendant argues that he was denied effective assistance of counsel. We agree.

A defendant must move for a new trial or an evidentiary hearing before the trial court in order to preserve the issue of ineffective assistance of counsel. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Because defendant failed to move for a new trial, or a *Ginther*² hearing, this Court's review is limited to those details contained within the appellate record. *Sabin, supra*, 242 Mich App 658-659. This Court reviews de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to establish ineffective assistance of counsel, generally a defendant must show that trial counsel's performance did not meet an objective standard of reasonableness, that such performance affected the outcome of the trial, and that an outcome so affected was unfair. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The right to counsel that the United States and Michigan Constitutions guarantee, U.S. Const, Am VI; Const 1963, art 1, sec 20, is the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 657 (1984); *People v Pubart* 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance is presumed, and a defendant bears a heavy burden to prove to the contrary. *LeBlanc, supra*, 465 Mich 578. However, certain circumstances are so likely to prejudice a defendant that no showing of prejudice is required, including the complete absence of counsel during a critical stage of trial. *Cronic, supra*, 466 US 658-659. A critical stage is one where a defendant is confronted by his expert adversary, and where defense counsel's absence might derogate from the defendant's right to a fair trial. *People v Barnett*, 163 Mich App 331, 335; 414 NW2d 378 (1987).

The trial court characterized its answer to the jury's question as part of the reading of the jury's verdict. However, the judge's statement to the jury informed it of the law applicable to the case, and is properly considered instruction to the jury. *People v Cook*, 130 Mich App 203, 205-206; 342 NW2d 628 (1983). Instructing the jury can be a critical stage of a trial if counsel's absence during the instructions might derogate from a defendant's right to a fair trial. *Barnett, supra*, 163 Mich App 331; *French v Jones*, 332 F3d 430, 436 (CA 6, 2003).

In this case, the judge's supplemental instruction to the jury was a critical stage because defendant was denied the opportunity to object to the judge's erroneous instruction. *French, supra*. Clearly, defendant was denied counsel during this critical stage. The judge alluded to the fact that defendant had agreed to be represented by codefendant Owens' counsel during the reading of the verdict. However, the judge's answer to the jury's question was beyond the scope of the reading of the verdict. Defendant also requested the presence of his own counsel. Both the agreement cited by the court, and defendant's questions and protests reveal that defendant had not agreed to be represented by codefendant Owens' counsel at this point. Because

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant was without counsel at this critical stage, we find he was denied effective assistance of counsel as guaranteed by the United States Constitution. *Cronic, supra*, 466 US 648.

Even had Owens' counsel represented defendant for the judge's supplemental instruction to the jury, such representation would have been ineffective. A defendant is denied effective assistance of counsel when a conflict of interest actually affects the adequacy of his representation. *Cuyler v Sullivan*, 446 US 335, 349; 100 S Ct 1708; 64 L Ed 2d 333 (1980). In this case, codefendant Owens had an interest in having the jury instructed that it could not find defendant guilty of the lesser offense of unarmed robbery. Such an instruction may have caused the jury to find codefendant Owens not guilty of armed robbery so that it need not find defendant guilty of the same crime. Defendant had an interest in allowing the jury to find him guilty of unarmed robbery and Owens guilty of armed robbery. This conflict prevented codefendant Owens' counsel from effectively assisting defendant, and objecting to the judge's proposed answer to the jury's question. When an actual conflict of interest denies a defendant the effective assistance of counsel, the defendant need not show prejudice. *Cuyler, supra* at 466 US 349-350.

In sum, we find that defendant was denied the effective assistance of counsel, either by virtue of the absence of defendant's actual counsel at the time the judge proposed its answer to the jury's question, or by virtue of an actual conflict of interest between defendant's interest and the interest of codefendant Owens, that affected the adequacy of codefense counsel's assistance as well.

Lastly, defendant also claims that defense counsel was ineffective when it failed to object to the prosecutor's misstatements of the law, and the prosecutor's denigration of defense counsel. In light of the fact that the prosecutor did not denigrate defense counsel, and any misstatements of the law were cured by the trial court's instructions, this claim fails. On this claim, defendant failed to show either that counsel's performance fell below an objective standard of reasonableness, or that there is a reasonable probability that but for defense counsel's failure to object the results of the proceedings would have been different. *People v Tora*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

V

Defendant also argues that the trial court violated the double jeopardy clauses of the United States and Michigan Constitutions when it amended defendant's sentence. We disagree.

This Court reviews double jeopardy claims de novo. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). In order to obtain relief on an unpreserved double jeopardy claim a defendant must show plain error that either prejudiced his substantial rights or seriously affected the fairness, integrity or public reputation of a judicial proceeding. *People v Wilson*, 242 Mich App 350, 359-360; 619 NW2d 413 (2000).

Initially, the trial court sentenced defendant to nine to thirty years' imprisonment for armed robbery, five to fifteen years' imprisonment for possession of cocaine, and five to fifteen years' imprisonment for fleeing and eluding a police officer, all sentences to be served concurrently. Later, the trial court amended defendant's sentence to make his sentence arising out of this case consecutive to any existing sentence for defendant's parole violation. Defendant

now claims that the trial court violated his double jeopardy rights by sentencing him twice for the same crime.

The double jeopardy clauses of the United States and Michigan Constitutions protect a defendant from multiple punishments for the same offense. US Const, Am V; Const 2003, art 1, sec 15; *People v Heron*, 464 Mich 593, 599; 628 NW2d 10 (2001). However, the double jeopardy clauses of both constitutions allow the correction of an invalid sentence. *People v Mapp*, 224 Mich App 431, 433; 569 NW2d 523 (1997). Defendant's initial sentence contained a legal flaw and was invalid. Namely, defendant's sentence in this case was not originally imposed consecutive to the existing sentence for which defendant was on parole. Consecutive sentencing is mandatory when a defendant is convicted of a crime committed while the defendant is on parole. MCL 768.7a(2); *People v Chavies*, 234 Mich App 274, 280-281; 593 NW2d 655 (1999). Because the trial court's amended sentence corrected an invalid sentence, it did not violate defendant's double jeopardy rights.

Furthermore, the trial court was not required to provide defendant with a hearing before amending his sentence. A new sentencing hearing is required when a trial court initially sentences a defendant to concurrent sentences for multiple convictions, and later amends the defendant's sentence so that the multiple sentences run consecutively. *People v Thomas*, 223 Mich App 9, 11; 566 NW2d 13 (1997). A new hearing is also required when a trial court amends a defendant's sentence by adding a mandatory consecutive sentence, if the circumstances requiring the addition of the mandatory consecutive sentence are unknown to the court at the time of the defendant's initial sentencing, and could affect the defendant's initial sentence. *People v Miles*, 454 Mich 90, 100-101; 559 NW2d 299 (1997).

In this case, defendant's amended sentence for parole violation is ministerial because the trial court has no discretion in imposing such a sentence. When a sentencing court amends a defendant's sentence in order to include a statutorily mandated sentence, challenges to the resentencing are moot and failure to provide a resentencing hearing is harmless error. *Miles, supra*, 454 Mich 101.

VI

Lastly, defendant argues that it should be resentenced for his armed robbery conviction because the trial court failed to recognize that it had discretion to depart from the sentencing guidelines. This issue is moot in light of the fact that we are reversing defendant's conviction on the armed robbery charge, thus we will not reach it.

We reverse defendant's armed robbery conviction and remand the case to the trial court for a new trial on that issue, and affirm the remainder of defendant's convictions and sentences. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell